IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

AS MODIFIED: JUNE 16, 2011
AS MODIFIED: JUNE 22, 2010
RENDERED: JUNE 17, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 6/16/11 Eli A Grav Am D.C.

2009-SC-000738-MR

TREVOR ANDREW SMITH; AND
BETHANY SMITH — APPELLANTS

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-000973-OA
JEFFERSON CIRCUIT COURT NO. 08-J-506574

ELEANORE GARBER, JUDGE, JEFFERSON
FAMILY COURT

AND

ANDREW CAHILL (REAL PARTY IN INTEREST) — APPELLEES

OPINION OF THE COURT BY JUSTICE NOBLE

AFFIRMING

This matter originated in a suit by Andrew Cahill in the Jefferson Family Court seeking to establish paternity and obtain custody of T.E.S., a minor child born to Bethany Smith, the former wife of Trevor Smith. The Smiths sought a writ of prohibition from the Court of Appeals enjoining the family court from ordering genetic testing. The Court of Appeals denied the writ. Because the

family court was acting within its jurisdiction to order genetic testing in such cases, this Court affirms.

I. Background

On July 16, 2004, T.E.S. was born to Appellant, Bethany Smith, the former wife of Appellant, Trevor Smith. Appellants were first married on October 26, 2002. In December, 2003, they filed a verified joint petition for dissolution of marriage. In the petition, they alleged that Bethany was pregnant with the child of a man other than her husband. They further alleged that they had separated as of July, 2003, and that the child had been conceived sometime in October, 2003. Appellants' divorce was finalized on February 19, 2004. Then on July 15, 2004 they remarried, just prior to T.E.S.'s birth the next day.

That marriage also failed, and the Appellants divorced again in September 2007. In that dissolution, Bethany and Trevor Smith were awarded joint custody of T.E.S. In December 2008, Appellee filed a petition in Jefferson Family Court to establish paternity and seek custody of T.E.S. After overruling motions to dismiss the petition, Jefferson Family Court Judge Eleanore Garber ordered genetic testing to resolve Cahill's claim of paternity.

Attempting to block the genetic testing, Appellants sought a writ of prohibition from the Court of Appeals against Judge Garber and real party in interest, Cahill. The Court of Appeals denied the writ in a 2-1 opinion. Appellants now appeal to this Court, urging us to find that the Jefferson Family Court is acting outside of its jurisdiction for the reason that T.E.S. is not a child born out of wedlock.

II. Analysis

Kentucky's family courts have been granted jurisdiction to handle all "[p]roceedings under the Uniform Act on Paternity, KRS Chapter 406." KRS 23A.100(2)(b). The section of the Act entitled "Applicability," KRS 406.180, specifies that the chapter applies to "cases of birth out of wedlock." As a result, to invoke the family court's jurisdiction under KRS 406, a petition must allege that the underlying birth occurred out of wedlock.

The only description of an out-of-wedlock birth in Chapter 406 is provided in KRS 406.011, which states that "a child born out of wedlock includes a child born to a married woman by a man other than her husband where evidence shows that the marital relationship between the husband and wife ceased ten (10) months prior to the birth of the child." Presumably, "child born out of wedlock" also includes its ordinary meaning — that is, a child born to an unmarried woman — in addition to the example. One obvious means by which a child may found to be born out of wedlock, other than in the case of an unmarried woman, is that there is *evidence* that the *marital relationship* between husband and wife *ceased* ten months before the child was born.

KRS 406.011 establishes a presumption of paternity when a child is born during a marriage: if born *during lawful wedlock* or *within ten months thereafter.* Strictly construed, this statute gives Trevor Smith the presumption that T.E.S. is his child, if based only on the fact that the child was born one day after Trevor's second marriage to Bethany. And, he would have this presumption even though the Appellants both made the judicial admission that Trevor is not the father of T.E.S. in their first divorce petition, which could be

offered in rebuttal of the presumption in the second divorce. However, the question of paternity was not raised during the second divorce action, and the trial court granted joint custody to the Appellants.

The wrinkle in this case that points out the problem with a strict construction of KRS 406.011 is that at one point in time there was a prior judicial admission (in the first divorce action) that Trevor was not the father of T.E.S. Are we to ignore a judicial fact in order to make a strict construction of obviously debatable statutory language the rule? Both Trevor and Bethany may have waived any contest of paternity by not raising it in the second divorce. *Hinshaw v. Hinshaw*, 237 S.W.3d 170 (Ky. 2007) But what about Cahill?

In looking at whether the family court judge had jurisdiction to hear this case, it is apparent that the family court, since its constitutional enactment, does have jurisdiction over a paternity action. Cahill fits the statutory requirement that a paternity action may be brought, regarding a child born out of wedlock, by the putative father. He has standing to bring this action, since his is not a bare claim or fishing expedition. KRS 406.021. The child's mother, Bethany, had in February 2004, under oath identified Cahill as the father of T.E.S. When Cahill filed his paternity suit, the trial court then had to determine if his allegations and evidence were sufficient to raise the question of whether the child was born out of wedlock, the primary allegation in a paternity suit. To make that determination, the court is required to review the prima facie evidence that supports the allegations. Cahill began his claim by stating that the *mother* of the child had identified him as the father, that he

had opportunity to be the father, and that the Appellants had made a judicial admission that Trevor was *not* the father of T.E.S. in the first divorce action.

These were sufficient evidentiary grounds to invoke the subject matter jurisdiction of the family court. The family court judge rightfully found that she had jurisdiction to go forward, and consequently ordered paternity testing to establish biological paternity. Since this case came to the Court on a writ action, the paternity case has not advanced to a sufficient degree to know definitively whether the evidence will support a finding that the marital relationship ceased ten months before the birth of T.E.S., but there is evidence in the record that Appellants stated in their joint petition for dissolution that they "separated" in July 2003 (which for purposes of divorce is construed as no longer having sexual relations), and the child was not conceived until October 2003, and was born in July 2004, *twelve* months after the separation.

Short of a divorce, proof of separation is the clearest evidence one can present that the marital relationship has ceased. In *J.N.R. v. O'Reilly*, 264 S.W.3d. 587 (Ky. 2008) *overruled by J.A.S. v. Bushelman*, ___ S.W.3d ___ (Ky. 2011), the plurality opinions emphasized the distinction of two prior cases where a birth was held to be "out of wedlock" because of the very fact that the couple had separated. *Id.* at 591 (citing *Montgomery*, 802 S.W.2d 943, 944 (Ky. App. 1990); *Bartlett v. Commonwealth*, 705 S.W.2d 470 (Ky. 1986)). Certainly, Appellants now sing a different tune, which would require the trial court to judge the credibility of the testimony. But the allegation and evidence of separation certainly further satisfies whatever possible jurisdictional requirements KRS 406.011 might entail.

However, another possible jurisdictional question is whether, having determined the custody of T.E.S. by granting joint custody to the Appellants, there has already been a "paternity" determination for this child. Neither Bethany nor Trevor raised paternity as an issue in the second divorce. In granting joint custody, the trial court relied on the presumption of paternity that a child born during the marriage is the child of the parties. Appellants, Trevor and Bethany have provided us with two inconsistent judgments; the first one dissolving their first marriage and adjudicating that Trevor was not the father, the second judgment adjudicating that he was the father.

Cahill's claim has not been adjudicated. He has shown that he could proceed with evidence of paternity, and that the trial court would otherwise have jurisdiction. Through Appellants' sworn affidavits from their divorce proceeding in December 2003, he has established that "[we] are not living together and we have lived apart continuously since we separated on or about July 2003". This means they separated 12 months prior to the birth. They stated further, "There is no likelihood of a reconciliation. The marriage is irretrievably broken. We had differences that we could not work out and we filed this action." In other words, they admitted that their relationship had ceased. Notably, Bethany also declared that "she [was] pregnant, however, the Co-Petitioner Trevor A. Smith [was] not the father . . . ."

While Appellants now contradict their own sworn affidavits, among other ways by insisting their relationship never ceased, that does nothing to negate the fact that Appellee made sufficient allegations, which are susceptible to being proved, and has presented the requisite evidence. Whether Appellants'

prior affidavits are to be believed over their current, contradictory claims is a matter appropriate for resolution at trial, not on a writ of prohibition petition.

It bears final note that if Appellants had not remarried (and re-divorced) there would be absolutely no bar to Cahill bringing this paternity action, and there would be no dispute about jurisdiction, given that the final judgment in the first divorce action held that Trevor was not the father. At most, Trevor could also allege that he was the father, and participate in his own paternity action.

Given the unusual facts of this case, arising from Appellant's first separation and divorce in which it was denied under oath that Trevor was the father, and the other court documents in which it was admitted under oath that Cahill was the father, the subsequent grant of joint custody to Trevor cannot prevent Cahill from going forward with his paternity action. To be sure, on the limited facts before us, one might question whether Cahill's claim should be barred by laches, since his suit was filed more than four years after he learned of his possible right to do so. However, if nothing else this case demonstrates the importance of leaving fact-finding and equitable orders to the sound discretion of the family court, which was largely founded to deal directly with such matters. The Jefferson Family Court thus has jurisdiction both legally and equitably to make the proper balancing of the rights of the parties and to determine the best interests of the child after fully developing the proof relating not only to paternity, but also to custody, visitation and support.

III. Conclusion

Because the Jefferson Family Court had jurisdiction to determine Andrew Cahill's paternity claim, the Court of Appeals's denial of a writ of prohibition is hereby affirmed.

Abramson, Schroder and Venters, JJ., concur. Minton, C.J., concurs in result only by separate opinion. Cunningham and Scott, JJ., concur in result only without separate opinion.

MINTON, C.J., CONCURRING IN RESULT ONLY: I continue to believe my opinion in *J.N.R. v. O'Reilly*, 264 S.W.3d 587 (Ky. 2008), is a correct exposition of the law; but I do concur in the result reached by the majority in this case. The unique facts here make this case distinguishable from *J.N.R.* for two interrelated reasons.

First, the parties in this case admitted in their first joint dissolution petition that Trevor was not the father of T.E.S. And, second, the parties admitted in that same joint petition that they had been separated since July 2003, a year before the birth of T.E.S. Accordingly, unlike *J.N.R.*, there is compelling evidence in this case that "the marital relationship between the husband and wife ceased ten . . . months prior to the birth of the child[,]" KRS 406.011, even though T.E.S. was born one day after Trevor and Bethany remarried.

Although the unusual facts of this case cast considerable doubt on the level of guidance the holding in this case will provide for future courts grappling with these types of issues, I concur in the result reached by the majority.

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ORDER DENYING PETITION FOR REHEARING AND GRANTING IN PART AND DENYING IN PART A PETITION FOR MODIFICATION

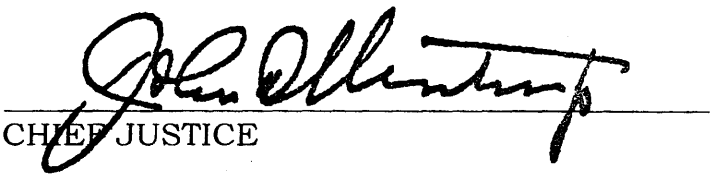
Appellant having filed a Petition for Modification or in the alternative a Petition for Rehearing of the Opinion of the Court by Justice Noble, rendered June 17, 2010 and modified June 22, 2010; and the Court being otherwise fully and sufficiently advised; The Court ORDERS that the Petition for Modification is GRANTED, in part and DENIED, in part. The attached

opinion is SUBSTITUTED in lieu of the original. Said modification does not affect the holding.

The Court ORDERS that the Petition for Rehearing is DENIED.

Minton, C.J., Abramson, Cunningham, Noble, Schroder and Venters, JJ., concurs. Scott, J., concurs in result only, and would grant the motion to identify the parties by initials.

ENTERED: June 16, 2011.



CHIEF JUSTICE